In the Supreme Court of the United States

October Term, 1977

No. 77-1821

RICHARD A. DAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Petitioner, RICHARD A. DAVIS, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit rendered in these proceedings on May 24, 1978.

OPINIONS BELOW

The majority and concurring opinions of the United States Court of Appeals for the Third Circuit are presently unreported and appear at Appendix I, infra, pp. A1-A15. The opinion of the United States District Court for the Middle District of Pennsylvania and its order denying Petitioner's motion for dismissal of the superseding indictment appear at Appendix II, infra, pp. A16-A21.

JURISDICTION

The order of the Court of Appeals for the Third Circuit denying the Petitioner's appeal was entered on May 24, 1978. The jurisdiction of this Court is involved under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is the superseding indictment defective because it includes charges which are not chargeable and punishable under State law due to the running of the State statute of limitations and the repeal of one State law?

2. Is the superseding indictment defective because it failed to apprise Petitioner of the factual basis of the alleged incidents of racketeering?

3. Was it error to refuse the motion for a mistrial made by Petitioner after witness Sedeshe testified to an event involving prior criminal activity?

4. Was it error to permit evidence of other crimes to be admitted in the Government's case in chief?

5. Was it error to deny Petitioner's motions for judgment of acquittal?

CONSTITUTIONAL PROVISIONS AND RULES OF EVIDENCE INVOLVED

United States Constitution, Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

United States Constitution, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

B. The Rules of Evidence involved are as follows:

Federal Rule of Evidence No. 403:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Federal Rule of Evidence No. 404 (b):

"Other crimes, wrongs or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

STATEMENT OF THE CASE

Petitioner was the Warden of the Dauphin County Prison at Harrisburg, Pennsylvania, and was prosecuted criminally by the indictment process in the District Court for the Middle District of Pennsylvania for alleged acts committed while he was acting in his official capacity as Warden. The basis for federal jurisdiction for this prosecution is 18 U.S.C. §3231.

Petitioner was indicated by the Grand Jury on June 1, 1977, on two (2) counts: (1) false swearing under 18 U.S.C. §1623 and (2) racketeering under 18 U.S.C. §§1961, 1962(c) and 1963. Various pretrial proceedings were held.

On July 13, 1977, a superseding indictment was filed containing three (3) counts: (1) false swearing under 18 U.S.C. §1623 (same as the first count in the original indictment); (2) racketeering under 18 U.S.C. §§1961, 1962(c) and 1963 (same as the second count of the original indictment plus an additional paragraph averring a further allegation of activity); and (3) corruptly influencing a witness under 18 U.S.C. §1503 (a new count).

Count II of the superseding indictment alleged that Petitioner from July 15, 1970 to June 8, 1976, on six different occasions, "did offer, confer and agree to confer upon and solicit, accept and agree to accept . . . consideration for a decision, opinion, recommendation, vote and exercise of discretion as the Warden of the Dauphin County prison. . . " Nothing further was provided in the

superseding indictment concerning the nature of the "decision", "opinion", "recommendation", "vote" or "exercise of discretion" to apprise Petitioner of what alleged acts he was to defend against.

A series of pretrial matters were held, including Petitioner's motion for dismissal of the superseding indictment because it failed to apprise Petitioner of the factual basis of the alleged acts of racketeering and because it alleged offenses that were not chargeable under State law. This motion was denied.

A jury trial commenced on August 9, 1977. At the trial one of the six incidents of Count II (the one designated in the superseding indictment in Paragraph 1 of Count II) was withdrawn by the Assistant United States Attorney. Thus, five of the six incidents alleged in Count II went to the jury. In each case, Petitioner took the witness stand to refute the charges.

During the course of the trial witnesses Sedeshe and Myers were permitted to testify for the Government's case in chief concerning Petitioner's alleged prior criminal activity. Petitioner's objections that this evidence was unfairly prejudicial were overruled. Furthermore, no prior notice of these charges was afforded Petitioner, and, thus, Petitioner was inadequately prepared to defend against them. Petitioner's motion for a mistrial after Sedeshe's testimony was denied.

Timely motions for acquittal were made after the close of the Government's case and after the verdict. Both were denied. The witnesses for the Government included convicted criminals and those granted immunity from prosecution.

The trial concluded on August 12, 1977, with the jury's verdict of not guilty on Counts I and III of the superseding indictment and guilty on Count II. An order of judgment was entered on September 7, 1977 sentencing Petitioner to a term of imprisonment of five years and a fine of $5,000.00.

On September 9, 1977, Petitioner timely filed an appeal with the United States Court of Appeals for the Third Circuit from the judgment of the District Court and raised the issues that are raised in this petition. The Court of Appeals affirmed the judgment of the District Court on May 24, 1978.

REASONS FOR GRANTING THE WRIT

A. The Courts Below Erred by Failing To Dismiss the Superseding Indictment Because It Includes Charges Which Are Not Chargeable and Punishable Under State Law Due to the Running of the State Statute of Limitations and Repeal of One State Law

The statute in question, 18 U.S.C. §1961 *et seq.*, prohibits a person from engaging in a "pattern of racketeering activity" (§1962(c)). "Racketeering activity" is clearly defined in §1961(1)(A) as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs which is *chargeable under State law and punishable by imprisonment for more than one year*" (emphasis added).

At the trial of this case, the Government sought to prove that Petitioner had engaged in acts of bribery under Pennsylvania criminal law which were barred from prosecution under Pennsylvania law. Paragraphs 1, 2 and 3 in Count II of the superseding indictment aver acts which occurred on or about July 15, 1970, May 3, 1972, and November 22, 1974, respectively, in the nature of bribery.

Paragraph 1 avers an alleged act of bribery occurring with one Thomas Willmont Motes on July 15, 1970. The indictment further avers that the alleged act constituted

a Pennsylvania statutory crime proscribed by the Act of June 24, 1939, P.L. 872, §303 (18 P.S. §4303). The Act of March 31, 1860, P.L. 427, §77, as amended (19 P.S. §211), specifically provides that a prosecution of the substantive crime is barred after the passage of two years from the date of the commission of the alleged act.

Paragraph 2 avers an alleged act of bribery occurring with one Isaac Hawkins on May 3, 1972, and Paragraph 3 avers a similar offense with one Shermont Bowser, November 22, 1974; both of said incidents are stated to be substantive offenses under the Pennsylvania Act of December 6, 1972, P.L. —, No. 334, §4701(a) (18 C.P.S.A. §4701(a)). In Section 108 of the same Act (18 C.P.S.A. §108), a two year statute of limitations is imposed.

Therefore, as of July 13, 1977, the date of the superseding indictment, the above three incidents were not "chargeable" under the law of Pennsylvania—the same being plainly barred by the appropriate statute of limitation.

Moreover, the Pennsylvania statute supporting the Government's claim in Paragraph 1 was repealed by the new Pennsylvania Crimes Code upon its effective date: June 6, 1973. In other words, as of July 13, 1977, no crime then existed in Pennsylvania for incidents occurring more than two years before said effective date.

Section 1961(1) of the Federal statute speaks in the present tense: "... any act ... which *is chargeable* under State law and *punishable* by imprisonment for more than one year" (emphasis added). It does not state "was" chargeable or "could have been" chargeable and

punishable. There is no reference to the past tense or the intention to speak other than in the present tense. This is made more clear when one considers the further requirement that the acts must be both "chargeable" and "punishable" under the State law. If it is considered possible that one could be charged with a crime which is barred by the statute of limitations, it is impossible that one could be punished for an act barred by such statute. Congress surely intended by adopting State criminal laws as its standard for the proscribed activity that prosecution under those State laws could result in punishment for the offenders. If the State laws could not lead to punishment they would not be criminal laws and would be outside the definition of Section 1961(1).

Further, if it is argued that the Federal statute merely adopts the substantive portions of the State law and not the statute of limitations, then one must deny the plain meaning of the statute that the acts must be both presently chargeable and punishable. The former argument simply ignores the actual language of the statute. If Congress had intended such construction it could have said very simply that such alleged act of racketeering activity "could have been" chargeable and punishable under State law within the period of the Federal limitations set forth in Section 1961(5). It did not so state. Therefore, the plain meaning of the language must be given its obvious interpretation.

Judge Aldisert, in his concurring opinion for the decision rendered below by the Court of Appeals (Appendix I, *infra*, pp. A7-A15), agreed with these contentions. He stated that the definition of "racketeering" is limited to

". . . 'any act or threat involving . . . bribery . . . which *is* chargeable under State law . . .' (Emphasis added). The present tense of the copulative verb 'is' was used. The use of the present tense indicates that this provision is to apply only to those acts chargeable and punishable at the time of the indictment . . . ." (Appendix I, *infra p.* A10).

Furthermore, Judge Aldisert stated:

". . . Clearly, even if 'chargeable' under Pennsylvania law, these offenses were not 'punishable' in 1977, at the time of the federal indictment, because of the interposition of the state statute of limitations. Accordingly, I would hold that even applying the federal statute of limitations, *United States v. Forsythe*, 550 F.2d 1127 (3d Cir. 1977), the essential ingredients of a *federal offense* were lacking." (Appendix I, *infra*, p. A8).

Count II of the superseding indictment charges Petitioner with conducting or participating in a "pattern of racketeering activity" consisting of six alleged incidents. As pleaded, the separate incidents are in the conjunctive indicating a continuation or "pattern" of prohibited acts, as obviously required and intended by the statute. It does not plead the incidents in the disjunctive or alternative. Therefore, since three of the six alleged incidents are not "chargeable", for the reasons addressed above, the superseding indictment is fatally defective on its face by not showing the required "pattern" of alleged illegal activity, and should be dismissed.

Since the Grand Jury made its finding based upon *all six* of the incidents, of which three were improperly

considered, it can only be deemed that, upon removal of the three defective incidents the remainder cannot stand independently of those which have been removed. The superseding indictment shows no intention of making the incident alternative in effect. It can only be concluded that the Grand Jury made its findings on the "pattern" or cumulative effect of the six incidents. That pattern and effect now being destroyed, the superseding indictment representing the Grand Jury's decision must likewise be destroyed in its conclusionary effect.

Petitioner contends, therefore, that the Courts below erred in failing to dismiss the superseding indictment in application of the precepts set forth above.

B. The Courts Below Erred by Failing To Dismiss the Superseding Indictment Because It Failed To Apprise Petitioner of the Factual Basis of the Alleged Acts of Racketeering

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Petitioner contends that the indictment did not sufficiently apprise him of the matters for which he was charged. He contends that he was severely legally prejudiced in his preparation of his defense by not being informed through the superseding indictment as to the matters which constituted unlawful acts in his alleged official actions.

The superseding indictment merely says that Petitioner did not offer, accept, etc. certain benefits "as consideration for a decision, opinion, recommendation. Vote and exercise of discretion as the Warden of the Dauphin County Prison." As pleaded, the indictment is merely a

reprint of the language of the Pennsylvania statutes (18 P.S. §4303 and 18 C.P.S.A. §4701(a)). It contains no factual averment as to the nature of the alleged "decision, opinion, recommendation, vote and exercise of discretion." Since each of the quoted acts is different from the others, Petitioner had no way of determining from the indictment in what way he became involved with making a "decision", an "opinion", a "recommendation", a "vote" or an "exercise of discretion". The superseding indictment was merely a specter of what the Government intended to prove at trial. It is an all-inclusive claim of wrongdoing without specifying the precise object of that claim. It is obvious that the penal statute sought to be enforced is designed to punish those who accept bribes for official action. Without specifying the nature of the official action, the Government sought to jeopardize Petitioner without permitting him the advance notice of how to meet those claims when they finally unfolded at the trial of the case.

The Court of Appeals, below, upheld the validity of the superseding indictment on the basis of *United States v. Laverick*, 348 F.2d 708 (3d Cir. 1965). However, in that case, no pretrial motion to dismiss the indictment for insufficiency had been made and the Court's ruling, therefore, was that "merely technical defects are waived when no objection is made to them at trial. Rule 12(b)(2). . . ." The Court further addressed the issue of whether there is a "danger in the allegations that a conviction or acquittal of the defendants would fail to bar a subsequent criminal prosecution on the grounds of double jeopardy. . . ." That issue is not raised by Petitioner.

Clearly, then, the *Laverick* decision is not relevant to the present case. A timely pretrial motion to dismiss the superseding indictment was made in this case by Petitioner. And the issue raised is not the possibility of "double jeopardy" but is the violation of Petitioner's Sixth Amendment right "to be informed of the nature and cause of the accusation . . ." and Fifth Amendment rights to "a presentment or indictment of a Grand Jury . . ." and to "due process of law. . . ."

Petitioner contends that the present case is governed by the rules set forth in *United States v. Russell*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed. 2d 240 (1962). In holding an indictment to be insufficient, the Supreme Court said:

> "Where guilt depends so crucially upon a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute"

Further it was said:

> "Undoubtedly the language of the statute may be used in the general description of an offense. but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense coming under the general description with which he is charged."

This case arose from a prosecution of a witness who refused to answer inquiries before a congressional subcommittee. The Supreme Court held the indictments defective for failure to indentify the subject matter under inquiry at the time of the defendant's alleged refusal to answer. The Court reiterated the oft-stated general rule that to be sufficient an indictment must (1) contain the elements of the offense intended to be charged and

sufficiently apprise the defendant of what he must be prepared to meet, and (2) enable the defendant to plead a former acquittal or conviction. The Court enumerated three problems or dangers which result from a factually incomplete indictment: (1) the defendant is required to go to trial with the chief issue undefined; (2) a conviction may rest on one point and its affirmance on another; (3) the prosecution has a free hand on appeal to fill in gaps of proof by surmise or conjecture. To the same effect see *United States v. Little*, 317 F. Supp. 1308 (Del. 1970); *California v. Choung*, 320 F. Supp. 625 (Cal. 1970).

In the instant case, Petitioner was charged with accepting money as the consideration for a "decision, opinion recommendation, vote and exercise of discretion as the Warden of the Dauphin County Prison." Petitioner contends that each of these five words can constitute a different type of action. In fact, the Pennsylvania statutes from which the terms are quoted refer to them in the disjunctive ". . . decision, opinion, recommendation, vote or other exercise of discretion . . ." (18 C.P.S.A. §4701(a)). The terms are obviously not synonymous, nor has the Pennsylvania Legislature attempted to make them such. Although each term has the exercise of discretion as its genesis, the method of such exercise can be in varying ways. A "decision" indicates that the actor had the ability to definitely resolve an issue for which corrupt payment was made. An "opinion" suggests the rendering of official advice and the background or reasoning supporting a "decision". "Recommendation" indicates an effort to influence another who may be making a "decision". "Vote" suggests that the actor is

one of several persons who collectively have the power to decide an issue. And as conjunctively used in the superseding indictment, "exercise of discretion" contemplates any conceivable action or inaction of the actor as it may affect any other person, action or situation. Obviously each term connotes entirely different factual situations. They are not merely different labels for the same occurrence.

In his official duties as a prison warden, Petitioner routinely did all of the concepts, that is, he was constantly called upon to make decisions, render opinions, give recommendations, vote on issues and take all sorts of actions or refrain therefrom in the exercise of his discretion. It is not difficult to contemplate the multitude of these actions in which the warden of the prison would participate in the routine performance of his duties. The superseding indictment alleges that in the cases of six persons, Petitioner did one or more of the discretionary acts without identifying what he supposedly did. The United States Attorney should have known which of the concepts was being considered by the Grand Jury and could have easily stated the same in the indictment. Instead, he chose to couch the charge in the vagueness of the statutory language, leaving the Petitioner in the ignorant position of not knowing which of the multitudes of acts would become the focus of the alleged criminal conduct. In other words, the guilt of the Petitioner depended upon a specific identification of fact, not an entire gamut of activities as stated in the superseding indictment. Under these circumstances, *Russell*, supra, holds that an indictment must do more than simply repeat the language of the criminal statute.

The trial judge sought to correct the deficiency by proclaiming a cure through the bill of particulars which Petitioner sought in his desperation to determine the facts he would be faced to meet at trial. This is plain error as held by all authorities across the Federal justice system. *United States v. Russell*, supra, specifically held that a bill of particulars cannot save an invalid indictment. For similar authority see *United States v. Nance*, 553 F.2d 699 (D.C. Cir., 1976); *United States v. Thomas*, 444 F.2d 919 (D.C. Cir., 1971); *United States v. Little*, 317 F. Supp. 1308 (Del., 1970); *United States v. Camp*, 541 F.2d 737 (C.A. 8, 1976). As reasoned in *United States v. Thomas*, supra, to permit an omission in an indictment to be cured by a bill of particulars would be to allow the grand jury to indict with one crime in mind and to allow the United States Attorney to prosecute by producing evidence of a different crime, thus allowing the United States Attorney to usurp the function of the grand jury.

As repeatedly stated by the courts, it is a fundamental guaranty of the Fifth and Sixth Amendments to the Federal Constitution that an accused may be tried only on charges made by a grand jury. The indictment must make clear the charges so as to confine the defendant's jeopardy to offenses charged by a group of his fellow citizens and to avoid his conviction on facts not found or perhaps not even presented to the grand jury which indicted him. The substantial safeguard of the guaranty to those charged with serious crimes cannot be eradicated under the claim that variations are mere technical departures from the rules. *United States v. Russell*, supra; *United States v. Stirone*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed. 2d 252;

Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed. 2d 569. Continuing, it must be remembered that a Federal indictment cannot be amended except by resubmission to the grand jury, unless the change is merely a matter of form. "Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney. . . ." *Ex Parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849; *United States v. Radetsky*, 535 F.2d 556 (C.A. 10, 1976).

In this case, Petitioner's rights were left initially in the control of the United States Attorney and subsequently at the mercy of the trial judge—a status which is violative of the basic rights of a person accused of a crime. The courts below erred in applying the legal precepts above. The superseding indictment being defective and invalid as a matter of law should have been dismissed on the pretrial application.

C. The Courts Below Erred in Refusing To Grant a Mistrial After Witness Sedeshe Testified

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In the trial of this case, the Government's first witness was Dale Sedeshe who was called to testify how he participated in a bribe of Petitioner for the benefit of a prisoner, James Horvath. He had just related his contacts with Petitioner and that Petitioner demanded $500 for the action solicited. The United States Attorney in an attempt to draw in other criminal conduct, continued with the witness:

"Q. Why did you raise the question of money?

A. Well, I knew it wasn't going to be done for nothin.

Q. What made you think it would be done for anything?"

At that point, counsel for Petitioner objected, which objection was overruled. The U.S. Attorney continued:

"Q. Could you tell the jury why it was you felt the issue of money should even be raised?

"A. Yes, I, one time before, I was in jail and it helped me out."

Again, counsel for Petitioner objected. After considerable discussion, it was determined that the prosecution wanted to have Sedeshe elaborate to show a precise bribe for his own benefit. The trial judge eventually sustained the objection and terminated the attempt to introduce evidence of another crime. Counsel for Petitioner then moved for a mistrial, arguing that irreparable prejudice had resulted to Petitioner by suggesting that he had a corrupt transaction with the witness. It should be kept in mind that the United States Attorney very carefully laid the groundwork for the resulting inference when he developed earlier that witness Sedeshe had himself been a prisoner at the Dauphin County Prison and that as a prisoner he learned to know Petitioner to the extent that "I knew him well". It should also be noted that Sedeshe's only jail experience of record was at the Dauphin County Prison.

Although the trial judge correctly disallowed any further testimony as to other crimes, he refused to protect Petitioner from the harm already done by the statement

which clearly indicated the witness had participated in a bribe. It was equally clear that the bribe occurred at the Dauphin County Prison at which Petitioner was employed and that Sedeshe knew Petitioner very well.

Petitioner contends that the Courts below erred by failing to grant the mistrial and failing to rectify the trial judge's abuse of discretion.

The discussion set forth in Reason D below is equally applicable here and is incorporated by reference.

D. The Courts Below Erred in Permitting Evidence of Other Crimes To Be Admitted in the Government's Case in Chief

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In addition to the matter raised in Issue C above, the Government was permitted, over the timely objections of Petitioner's counsel, to introduce evidence of another alleged crime involving the Petitioner through witness Charles Myers. Myers testified at length concerning his alleged corrupt dealing with the Petitioner to the effect that the Petitioner had demanded $750 to intercede on the witness' behalf in connection with a pending criminal gambling charge against the witness.

At the end of the direct examination, Petitioner's counsel requested that the Court recess for at least half an hour to enable counsel to confer with the Petitioner concerning Myers' testimony and the Jencks Act material handed to counsel at that time. Myers' surprise testimony constituted evidence in support of an alleged crime, similar to the six other alleged in the superseding indict-

ment, but for which no charge had been made in the superseding indictment. Thus, Petitioner was unprepared to defend against this new, unindicted charge.

The trial judge begrudgingly granted a mere fifteen minutes recess. No opportunity was given for investigation and only fifteen minutes was allowed to prepare for cross-examination of a witness whose testimony was completely unanticipated and to prepare to defend a wholly new criminal charge without prior notice. It should also be noted that witness Myers was called as the last Government witness in its case in chief, thus leaving the Petitioner no opportunity to investigate his testimony before proceeding with his defense in chief.

Matters of considerable importance might have been developed to discredit the witness if Petitioner had prior notice of the witness' purpose and had the Court permitted Petitioner the opportunity to prepare for it. As the record indicates, Myers was an habitual criminal in gambling matters and admitted operating a speakeasy. Being on the other side of the law represented by Petitioner, Myers had every reason to be hostile toward Petitioner and consequently untruthful in his accusations. Myers further admitted that he told contradictory stories to the Federal investigators—at one point denying any knowledge of improprieties at the Dauphin County Prison and later testifying as to his own complicity with Petitioner. In view of this background, Petitioner should have been afforded the opportunity to fully investigate the allegations and produce witnesses and other evidence which may have been discovered in such investigation. Instead, he was cut off with a 15 minutes recess—a miniscule amount of time compared with the jeopardy he faced

which has now been determined to be five years of his life and $5,000 of his property as imposed by the judge who was too impatient to extend any reasonable opportunity to properly prepare for a defense.

It is in view of this unpleasant background that your Honorable Court is asked to review the decisions of the lower Courts so that it may be determined that Myers' testimony was improperly admitted and, in the alternative, that it was an abuse of discretion to disallow a reasonable opportunity for defense preparation.

The Government sought to introduce Myers' testimony under Federal Rule of Evidence No. 404(b) which provides as follows:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

This rule must be read in conjunction with Rule 403 which provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Coming as it did at the very end of the Government's case in chief, Myers' testimony followed several witnesses

who testified to five other alleged bribes charged in the superseding indictment (a sixth incident had failed in proof and was subsequently withdrawn by the United States Attorney). At that point several witnesses testified that Petitioner had been involved with them in the acceptance of money in return for various favors purportedly through his official position as Warden. On the other hand, Myers' testimony was in no way related to the other five incidents. His story was separate and constituted a wholly independent crime. This was known to the United States Attorney at the time of the grand jury proceedings but was not included in the resulting indictment although he in fact testified before the same Grand Jury which returned the superseding indictment involved in this appeal.

The Government's failure to include the Myers' incident as an additional charge in Count II of the superseding indictment was obviously intentional when one considers that one of the reasons for the superseding indictment was to add Paragraph 3 relating to the Shermont Bowser incident. Since Myers testified at the same Grand Jury session which returned the superseding indictment, the failure to include that incident was clearly deliberate, thus giving rise to the contentions which follow.

The United States Attorney offered the testimony purportedly to show Petitioner's motive, intent and plan. It must always be remembered that Myers was in no way connected with any of the six principal incidents contained in the indictment. He was merely called to relate his own individual dealings with Petitioner—a set of facts which could have been the subject of a separate charge in the indictment. It becomes obvious that the

Government used Myers' testimony for its surprise value and its overall damaging effect to inject a whole separate additional criminal act. Petitioner contends that Rule 403 was intended to prevent such an event from occurring. The Court failed in its duty under Rule 403 to exclude it because of the danger of unfair prejudice and the needless presentation of cumulative evidence.

Although it has been held that evidence of other offenses can be received "if relevant for any purpose", *United States v. Stirone*, 262 F.2d 571 (3d Cir., 1958), reversed on other grounds 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed 252 (1960), such a broad interpretation permits the exceptions to swallow the rule against admission of other offensive evidence. It is widely recognized that the general rule holds that evidence of other offenses should be considered inadmissible in criminal prosecutions. *United States v. Klein*, 515 F.2d 751 (3d Cir., 1975). The policy reason behind this rule is the danger that the jury will convict on other offenses than the one for which the defendant is being charged. Consequently, we believe that the rule as stated in *Stirone* is far too broad.

In the case of *United States v. Cook*, 538 F.2d 1000 (3d Cir., 1976), it was held that the trial court abused its discretion by admitting evidence of another offense which had a high potential to prejudice the jury and which was only relevant to a collateral issue. The test set forth in *Cook* is as follows:

> ". . . the trial judge may in the exercise of his sound discretion, exclude evidence which is logically relevant to an issue other than propensity if he finds

that the probative value of such evidence is substantially outweighed by the risk that its admission will create a substantial danger of undue prejudice." P. 1008.

The *Cook* opinion cites guidelines established in *United States v. Cavallino*, 498 F.2d 1200 (5th Cir., 1974). We urge that these guidelines or "threshold inquiries" be utilized in the instant matter. They are set forth in *Cavallino* as follows:

"1. Is there plain, clear and convincing proof of the commission of the other similar offense by the accused?

2. How recent are the other crimes in relation to the one charged?

3. Are 'identity' and 'intent' (or whatever exception this evidence is to have probative value toward) material facts in issue?

4. Has the prosecution actual need for this evidence?

5. Considering the prosecutions actual need on these contested issues and its lack of any other evidence, does the probative value outweigh the evidence?

Then the Court should determine whether the proffered evidence fits the exceptions." P. 1206

In analyzing these criteria in the context of the instant matter, we find that it was an abuse of discretion to allow Myers' testimony in under these guidelines. The testimony of a professional gambler and a bookie convicted six or seven times, who was unquestionably on the other side of the law from the accused, is not highly convincing.

Furthermore, if time had been allowed Davis to prepare properly, it is quite likely that this testimony could have been strongly discredited.

As to the second criteria, Myers' testimony was recent enough not to be objectionable. However, we do not believe that identity, motive or intent were really material issues in this inquiry. See *United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975). Davis flatly denied accepting bribes in all cases but one where he accepted the money in order to have evidence against those attempting to bribe him but returned it the next day.

If the jury finds that Davis performed the acts and made the statements he is alleged to have made, intent is not a material issue but would be inferred from those actions. Furthermore, the manner in which this testimony was introduced, through a surprise witness, was highly prejudicial to the defendant's rights.

Unfair prejudice is borne out by the insurmountable and impossible task of defending against it as related at length above. Having been prevented from learning of the incident by the selective tactics of the United States Attorney and being denied the opportunity to properly prepare and defend against it by the trial judge, Petitioner was clearly overwhelmed by the surprise and inability to counter in any way. As stated repeatedly above, Petitioner was required to defend against a seventh charge under Count II with no prior notice and with no opportunity to prepare for any defense which he may have had after investigation. Petitioner was given a month to prepare for six of the charges and less than an hour for the seventh. Unfair prejudice should be apparent.

In light of the above, it is clear that the admission of Myers' testimony was a violation of Rules 403 and 404 (b) and that both the admission of Myers' testimony and the failure to allow Petitioner sufficient time to investigate and defend against the allegations made by Myers were abuses of discretion.

E. The Courts Below Erred in Denying Petitioner's Motion for Judgment of Acquittal

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Petitioner made timely motions for judgment of acquittal both after the close of the Government's case and after the verdict. The trial judge denied both.

Petitioner is well aware that the method of review on this issue is to evaluate the evidence in the light most favorable to the Government, but the standard still remains that a verdict in a criminal case shall be sustained only where there is relevant evidence from which a jury could properly find or infer beyond a reasonable doubt that the accused is guilty. *American Tobacco Company v. United States*, 328 U.S. 781 (1946).

In this case the evidence against the Petitioner came from sources which were of the most suspect and tainted variety. Witnesses James Horvath and Dale Sedeshe were convicted criminals and had been extended immunity from their complicity in the incidents to which they testified. Jack Arnold, a confederate of Horvath and Sedeshe, was likewise granted immunity from prosecution.

Isaac Hawkins was another convicted criminal whose entire testimony was so rife with inconsistencies and unreasonableness that no one could possibly believe the matters involving Petitioner. He was protected from prosecution by the statute of limitations.

Similarly, Shermont Bowser was protected by the running of the statute of limitations. Although he admitted getting all the money from the victim in Paragraph 3 of Count II and created the whole wrongful act, nevertheless, he was still employed by the County of Dauphin in his same capacity at the Prison—a circumstance casting considerable doubt upon the bona fides of his story.

Overall, the Government's primary witnesses were all personally interested in the incidents charged, whether as principals with Petitioner or closely associated with the principals. None were objective; all were from the other side of the system that Petitioner was engaged to enforce as a prison warden. Each had an obvious hostility toward and bias against Petitioner.

To all of this was added the prejudicial testimony of Charles Myers having the effect of an additional charge for which no defense was allowed.

Petitioner contends that an unbiased review of the evidence adduced at the trial will show that the accusations made against him are unbelievable. The verdict should not be allowed to stand on such incredible assertions.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
Richard C. Snelbaker,
Attorney for Petitioner

APPENDIX I

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 77-2263

UNITED STATES OF AMERICA
v.
DAVIS, RICHARD A.,
Appellant

(D.C. Crim. No. 77-71)

On Appeal From the United States District Court for the Middle District of Pennsylvania

Argued March 28, 1978

BEFORE: ALDISERT, GIBBONS, HIGGENBOTHAM,
Circuit Judges

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OPINION OF THE COURT

(Filed May 24, 1978)

GIBBONS, *Circuit Judge*

Richard A. Davis, former warden of the Dauphin County Prison in Harrisburg, Pa., appeals from the judgment of sentence imposed following his conviction in a jury trial for a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).[1] The indictment on which he was tried charged that in numerous instances he solicited or accepted brites "as consideration for a decision, opinion, recommendation, vote and exercise of discretion as the Warden," contrary to 18 P.S. §4701(a).[2] Prior to trial, Davis moved for the dismissal of the in-

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[1] Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, 84 Stat. 941 (codified in 18 U.S.C. §1961).

[2] 18 P.S. §4701(a):

> *Offenses defined.*—A person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:
>
> (1) any pecuniary benefit as consideration for the decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter by the recipient;
>
> (2) any benefits as consideration for the decision, vote, recommendation or other exercise of official discretion by the recipient in a judicial, administrative or legislative proceeding; or
>
> (3) any benefit as consideration for a violation of a known legal duty as public servant or party official.

Prior to June 6, 1973, a comparable statute was codified in 18 P.S. §4303.

dictment both as time-barred and as failing to aver sufficient facts to give him notice of the charges against him. This motion was denied, the case was tried, and a verdict of guilty was returned. On appeal, Davis makes several contentions.

I. THE TIME BAR

RICO prohibits a person from engaging in a "pattern racketeering activity." 18 U.S.C. §1962(c). "Racketeering activity" is defined, for purposes of this case, as bribery or extortion "which is chargeable under State law and punishable for more than one year." 18 U.S.C. §1961(1)(A). Davis contends that prosecution for all the acts of bribery which the government charged and proved was barred by the relevant Pennsylvania statute of limitations. Because he contends that in RICO Congress intended to borrow state statutes of limitations for the predicate state offenses, Davis urges us to read the words "chargeable under State law" to mean "presently chargeable under State law." In *United States v. Forsythe*, 560

F.2d 1127, 1134 (3d Cir. 1977), we held that the governing statute of limitations is found, not in state law, but in 18 U.S.C. §3282.

Davis argues that *Forsythe* was incorrectly decided, but that in any event it did not explicitly reject a refinement of his argument which we should now accept. That refinement is that the word "chargeable" does more than refer to state statutes of limitations; it defines the federal offense. An offense, in other words, that is not "chargeable under State law" is not indictable under RICO.

It is true that *Forsythe* did not in so many words pass on this more refined argument, but we think it rejected it implicitly. The holding in *Forsythe* was that Congress intended to permit federal indictment within the time specified in §3282 for offenses which, when committed, were "chargeable under State law and punishable for more than one year." The last-quoted words were meant to limit RICO to serious offenses, offenses which in many but not all jurisdictions would be called felonies.

We now make explicit what was implicit in *Forsythe:* the words "chargeable under State law" in §1961 (1) (A) mean "chargeable under State law at the time the offense was committed." Davis, therefore, has no ground for objecting to the timeliness of the indictment. We note, furthermore, that in this case three of the five acts of bribery which the government proved took place within the applicable state statute of limitations. Three acts of bribery make a pattern of racketeering activity.. The relevant dates show that the pattern continued until well within even the state limitations. 18 P.S. §108. For this additional reason, the indictment against Davis was timely returned.

II. VAGUENESS

Davis's next argument is that the indictment did not give him fair warning of the offense with which he was charged. He acknowledges that it listed bribes in specific amounts from named individuals at designated times and places. But he claims that it failed to inform him of what precisely he was alleged to have done in return for each bribe. The indictment, which adopted almost verbatim the wording of 18 P.S. §4701 (a) (1), charged that each bribe was received "as consideration for a decision, opinion, recommendation, vote and exercise of discretion."

The short answer to Davis's argument is that the gravamen of the offense defined in §4701 is the solicitation or acceptance of a bribe, not the delivery of its *quid pro quo.* In an analogous case we have held:

> The essence of the crime here charged is the receiving of the money, not the quid pro quo received or promised for that money, and where the statutes use the disjunctive to describe the alternate means of committing the same statutory offense and only one crime is charged, the means of commission are permissible.

United States v. Laverick, 348 F.2d 708, 714 (3d Cir. 1965) (citation omitted).

The government's position on appeal is that, because Davis did not object to the charge quoted in the margin,[3] he cannot now contend that the indictment should have specified the *quid pro quo.* We note that Davis did challenge the sufficiency of the indictment in a pretrial motion.

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[3] The court charged:

> In Count II it is not necessary for the government to show that the Defendant had the authority to assist

For that reason, we do not rest our affirmance on Fed. R. Crim. P. 30. We hold instead that the indictment was sufficiently specific and that the charge was correct.

III. EVIDENCE OF OTHER CRIMES

In addition, Davis urges that the trial judge erred when he permitted witnesses Sedeshe and Myers to testify concerning other crimes of a similar nature. We have recently reaffirmed the importance of avoiding the undue prejudice which arises from the admission of evidence concerning prior crimes which has little probative value for the issues being tried. *See United States v. Cook*, 538 F.2d 1000 (3d Cir. 1976). In this case, however, the testimony of Sedeshe and Myers was relevant to Davis's motive or intent in accepting the money tendered. The evidence was, therefore, admissible under Fed. R. Ev. 404 (b).

IV. MOTION FOR JUDGMENT OF ACQUITTAL

Davis's final contention is that his motion for a judgment of acquittal should have been granted. In light of the record, this contention is frivolous.

V. CONCLUSION

The judgment of the district court will be affirmed.

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inmates in securing special favors, nor need the government show that the Defendant did anything at all to assist the inmates. The issue is not whether the Defendant successfully aided the inmates, but whether he agreed to accept money from two or more of the persons named out of the five, who expected that he would provide assistance in return for the money.
App. 812.

ALDISERT, *Circuit Judge*, concurring.

I join in Parts II-V of the majority opinion and concur in the result reached in Part I. I agree that at the time of the original indictment on June 1, 1977 and the superseding indictment on July 13, 1977, at least three incidents of bribery constituted acts "chargeable under State law and punishable by imprisonment for more than one year". 18 U.S.C. §1961(1)(A). And with the majority I agree that these acts constitute a pattern of racketeering activity, sufficient to sustain a conviction under the indictment.

I part company with my brothers of the majority on a philosophical note only, a note that does not affect the outcome of our decision, but nevertheless reflects an important difference in interpreting a federal criminal statute widely used by the Department of Justice. I would hold that the acts of bribery occurring in 1972 and 1974[1] should not have been considered as "racketeering activity" under a 1977 federal indictment based on §1961(1)(A) because these acts were no longer chargeable and punishable under Pennsylvania law.

I.

Under the federal statutory scheme, the essential elements of a racketeering offense require an analysis of both federal and state law. Thus, a pattern of racketeering is

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[1] The superseding indictment originally alleged an additional incident of bribery, occurring in 1970. Because the government's witness did not offer sufficient testimony regarding this alleged act, the government voluntarily withdrew this portion of the indictment at trial.

defined as "at least two acts of racketeering activity", 18 U.S.C. §1961(5), and racketeering activity is defined (for the purposes of this case) as "any act or threat involving . . . bribery . . . which is chargeable under State law and punishable by imprisonment for more than one year. . . ." 18 U.S.C. §1961(1)(A).

The indictment alleged that the acts were violations of the Pennsylvania crime of bribery, proscribed in 18 P.S. §4303 (prior to June 6, 1973), and 18 P.S. §4701(a). By the provisions of 19 P.S. §211, prosecution of this state crime is barred after the passing of two years from the date of the commission of the alleged act. Nevertheless, Count II of the indictment averred acts occurring on or about May 3, 1972, and November 22, 1974. Clearly, even if "chargeable" under Pennsylvania law, these offenses were not "punishable" in 1977, at the time of the federal indictment, because of the interposition of the state statute of limitations. Accordingly, I would hold that even applying the *federal* statute of limitations, *United States v. Forsythe*, 550 F.2d 1127 (3d Cir. 1977), the essential ingredients of a *federal offense* were lacking.

It is conceded that bribery of a state official is not a discrete offense under federal criminal statutes. It is equally clear to me that since the federal definitional statute requires that the racketeering offense be both chargeable *and* punishable under the state law, the government could not, and did not, prove all the elements necessary under the federal statute. It was a simple case of legal impossibility of performance.[2]

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[2] *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973), provides guidance in such a situation:

II.

Although proper judicial interpretation of any federal statute is always important, proper judicial interpretation of a criminal statute is critical. The maxim *nullum crimen sine lege, nulla poena sine lege* reminds us that the courts may not punish conduct as criminal unless that conduct has transgressed the clear, plain, or fair meaning of the defined offense. In the federal courts, this means a congressionally defined offense, because there is no federal common law of crimes.

Nevertheless, an interesting notion is volunteered here that bribery activities which occurred in 1972 and 1974 can still fall within the congressional definition of racketeering in 1977, by declaring judicially that "the words 'chargeable under State law' in §1961(1)(A) mean

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> Legal impossibility is said to occur where the intended acts, even if completed, would not amount to a crime. . . . "It is commonplace that federal courts are courts of limited jurisdiction, and that there are no common law offenses against the United States. 'The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that should have jurisdiction of the offense.' . . . 'It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms.'" . . . We distinguish between the defense of factual impossibility, which is not involved here, and legal impossibility, which is.

482 F.2d at 188-90 (citations omitted). *See United States v. Frumento*, 563 F.2d 1083, 1096-97 (3d Cir. 1977) (Aldisert, J., dissenting).

'chargeable under State law at the time the offense was committed.'" (Majority Opinion at 3). This is not statutory *interpretation;* it is statutory *construction* in the pristine fabricating sense. It is a judicial, not legislative, definition of criminal activity, a genre of statutory interpretation outlawed by a host of Supreme Court decisions. *See, e.g., Huddleston v. United States,* 415 U.S. 814, 831 (1974).

This semantic excursion ignores the precise language Congress utilized in §1961(1)(A), to-wit, "any act or threat involving . . . bribery . . . which *is* chargeable under State law . . . ." (Emphasis added). The present tense of the copulative verb "is" was used. The use of the present tense indicates that this provision is to apply only to those acts chargeable and punishable at the time of the indictment. Had Congress intended otherwise it could have just as easily added "was or has been"; indeed, Congress could have used the words the majority has added to the statute: "is chargeable under State law *at the time the offense was committed.*" But Congress did not add these words, and we cannot. We cannot, because to do so is to run counter to a basic tenet of interpretation of penal statutes best evidenced by Mr. Justice Reed's statement in *United States v. Bramblett,* 348 U.S. 503, 509 (1954): "That criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority."

III.

Strict interpretation of a penal statute, of course, cannot be applied *in vacuo;* it cannot be utilized to thwart clearly expressed statutory text, or, in the event of ambiguity, the legislative purpose expressed in the statute or

its legislative history. The reasoning and policy considerations guiding the interpretation of ambiguous statutory language were set out by Mr. Justice Marshall in *United States v. Bass,* 404 U.S. 336 (1971):

> [A]s we have recently reaffirmed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." . . . In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." United States v. Universal C.I.T. Credit Corp., 344 U.S. 318, 321-322 (1952). This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." McBoyle v. United States, 283 U.S. 26, 27 (1931) (Holmes, J.) See also United States v. Cardiff, 344 U.S. 174 (1952). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967).

404 U.S. at 347-48 (1971) (footnote and citations omitted).

I have indicated that I find no ambiguity in the present tense descriptive language of those state offenses incorporated in §1961(1)(A) as federal offenses. Assuming without conceding that there is ambiguity, my examination of the legislative history compel no contrary result.

A.

The Racketeer Influenced and Corrupt Organizations statute (RICO) had as its genesis the Senate's Organized Crime Control Bill, introduced in early 1969. "Racketeering activity" was originally defined, in relevant part, as "any act involving the danger of violence to life, limb, or property indictable under State or Federal law and punishable by imprisonment for more than one year." The Justice Department, however, took the position that the suggested language was "too broad and would result in a large number of unintended applications, as well as tending toward a complete federalization of criminal justice."[3] It suggested that §1961(1)(A) be redefined as follows: "Any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, usury, or dealing in narcotic drugs, marihuana or other dangerous drugs, which is indictable under State law and punishable for

[3] Letter from Richard G. Kleindiest, Deputy Attorney General, to Senator John L. McClellan, Chairman of the Subcommittee on Criminal Laws and Procedure, *reprinted in Hearings on S. 30 before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary* 91st Cong., 1st Sess. p. 405.

more than one year." The Department stated, "It is felt that by thus narrowing the definition of the class of applicable state crimes in terms of their generic meaning the definition of 'racketeering activity' contained in Section 1961(1)(A) will be both broad enough to include most state statutes customarily invoked against organized crime yet narrow enough to be constitutional. *United States v. Nardello*, 393 U.S. 286 (1969)."

The Senate accepted the gist of the Justice Department's recommendations in its final passage of the crime control bill:

> §1961(1). "[R]acketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year.

S. Rep. No. 91-617, 91st Cong., 1st Sess. 21 (1969). The bill was subsequently favorably considered in hearings before Sub-Committee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., and, with minor amendments, was eventually enacted as the Organized Crime Control Act of 1970, P.L. 91-452, 84 Stat. 922.

B.

From this legislative history, I draw several significant conclusions. The Justice Department's request that the statutory definition not be "too broad" was respected: state crimes were defined in "terms of their generic meaning" and federal crimes were defined with specificity in §1961(1)(B). The Senate Committee report noted that

"[t]he state offenses are included by generic designation," Senate Report, *supra*, at 158, and the House Committee stated that " '[r]acketeering activity' is defined in terms of specific State and Federal criminal statutes". and that "State offenses are included by generic designation." 1970 U.S. CODE CONG. & ADMIN. NEWS, 91st Cong., 2d Sess., pp. 4010, 4032.

Congress therefore can be said to have heeded the Justice Department's admonition to avoid "a large number of unintended applications" and "a complete federalization of criminal justice." Therefore §904 of Title IX of P.L. 91-452, which provided that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purpose," must be read in light of the language of the statute and the legislative history. And in viewing the legislative purpose, I detect nothing that precludes the application of the rule of narrow construction of penal statutes.

IV.

In sum, I find the statutory language to be clear. For a federal offense to exist, by definition there must also be a state offense. There was no federal offense here, because the acts had to be "chargeable and punishable" under state law. "If the language of a statute be plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it plainly expressed." *Reuther v. Trustees of Trucking Employees*, — F.2d — (3d Cir. No. 77-1986, 1978), *quoting* Lord Atkinson in *Vacher & Sons, Ltd. v. London Society of Compositers*, [1913] A.C. 107, 121-22 (House of Lords). "If the language be clear it is conclusive. There can be

no construction where there is nothing to construe." *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1868).

And even assuming that there is ambiguity, we must resort to the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass, supra.* In view of the statute's text and its history, especially the congressional acquiescence in the Justice Department's request to narrow the definition of state offenses, the application of the traditional principle of strict construction of this penal statute effectuates, rather than defeats, the obvious legislative purpose.

For all these reasons, I would hold that where one has been acquitted of a state offense, *see, e.g., United States v. Frumento, supra,* (Aldisert, J., dissenting), or where, as here, prosecution of a state offense is outlawed by a state statute of limitations at the time of the federal indictment, there is no generic state crime "chargeable and punishable under State law," and there cannot be a federal offense under §1961 (1) (A).

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX II

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 77-71-1
(Judge Muir)

UNITED STATES OF AMERICA

vs.

RICHARD A. DAVIS

ORDER

August 2, 1977

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On the first day of June, 1977, a federal grand jury indicted Davis. On July 13, 1977 the federal grand jury filed a superseding indictment against Davis. Count II of that indictment charged him with violating 18 U.S.C.A. §§1961, 1962(c) and 1963 by committing six acts between the 15th day of July 15, 1970, and June 8, 1976 which allegedly violated the Act of June 24, 1939, P.L. 872 §303, 18 P.S. §4303 and the Act of December 6, 1972, P.L. ——, No. 334, §1, 18 Pa. C.S.A. §4701 while

he was an employee of and associated with an enterprise engaged in and affecting interstate commerce; that is, the Warden of the Dauphin County Prison, Harrisburg, Pennsylvania. On July 25, 1977, in compliance with this Court's Order No. 2 of July 14, 1977, Davis filed a motion to dismiss Count II of the indictment accompanied by a brief. On July 29, 1977, the United States filed a responsive brief in opposition to the motion. Davis' contentions that Count II of the indictment should be dismissed will be dealt with *seriatim*.

First, Davis contends that Count II of the indictment should be dismissed because three of the six alleged incidents of racketeering are not chargeable offenses under state law punishable by imprisonment for more than one year because he could not now be tried for such offenses in the courts of Pennsylvania since the statute of limitations of the bribery statutes, 18 P.S. §4303 and 18 Pa. C.S.A. §4701 have expired. Racketeering activity for the purposes of 18 U.S.C.A. §1961 et seq. is defined in relevant part as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C.A. §1961(1)(A). State law is used in the racketeering statute to define a federal offense. An offense which when committed would have been indictable under Pennsylvania law is within the statutory definition. Otherwise, state statutes of limitations would control the federal statute of limitations specifically set forth by Congress to apply to the racketeering statute. See 18 U.S.C.A. §1961(5); United States vs. Fineman, Cr. 77-36 (E.D. Pa. 1977).

Similar arguments have been raised against prosecutions pursuant to 18 U.S.C.A. §1952 and §1955 which prohibit travelling in interstate commerce to carry out acts illegal under state law. In United States of America vs. Revel, 493 F.2d 1 (5th Cir. 1974), cert. denied 421 U.S. 909 (1975), the Defendant was indicted for a violation of 18 U.S.C.A. §1955. The gambling laws of Alabama were used to define the federal offense. Defendant contended that the state statute of limitations had expired before the federal indictment had been returned. The Court rejected that argument because the reference to state law in the statute was for the purpose of defining the conduct prohibited. See United States vs. Cerone, 452 F.2d 274, 286-87 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972); United States vs. Karigiannis, 430 F.2d 148, 150 (7th Cir. 1970) (Justice Clark sitting by designation).

If Congress had intended the state statute of limitations to apply to the racketeering statute, it could have so stated. Davis has provided no authority to support his contention. In the light of the foregoing, the Defendant's motion to dismiss the indictment because two of the offenses charged in Count II did not occur within the state statute of limitations will be denied.

Second, Davis contends that several of the acts charged in Count II do not fall within the federal statute of limitations. See 18 U.S.C.A. §3282 which established a five-year period of limitations for all non-capital offenses. That statute is a general statute of limitations which does not apply when Congress sets forth a specific statute of limitation for an offense. The Racketeer Influenced and Corrupt Organization Statute contains such

a specific limitation. 18 U.S.C.A. §1961(5) states that a pattern of racketeering activity requires at least two acts of racketeering activity, one of which occurred after the effective date of the chapter and the last of which occurred within 10 years excluding any period of imprisonment after the commission of a prior act of racketeering activity. The acts alleged in Count II of Davis' indictment fall within the provisions of this section. Consequently Davis' motion to dismiss Count II because it is barred by the federal statute of limitations will be denied.

Third, Davis contends that Count II of the indictment should be dismissed because it does not aver the factual basis of the conclusion that he agreed to make or perform "a decision, opinion, recommendation, vote and exercise of discretion" as the Warden of the Dauphin County Prison, in return for money, thereby failing to notify him of the nature of the charges which he is expected to defend against and denying him the opportunity properly to prepare for his defense. The Supreme Court of the United States in Hamling vs. United States, 418 U.S. 87, 117 (1974), set forth the following standard by which the adequacy of an indictment is to be measured.

> "Our prior cases indicate that an indictment is sufficient if it first contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. (Citations omitted) It is generally sufficient that an indictment set forth the offense and in the words of the statute itself as long as 'those words of them-

selves fully, directly, and expressly without any uncertainty or ambiguity set forth all the elements necessary to constitute the offense intended to be punished. (Citations omitted) Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense coming under the general description with which he is charged.' " (Citation omitted.)

Count II of the indictment possesses all of the elements required to establish a violation of 18 U.S.C.A. §§1961 et seq. Count II of the indictment sets forth six incidents in which it is charged that Davis did offer, confer and agree to confer upon and solicit, accept and agree to accept from various individuals named therein sums of money for a decision, opinion or recommendation, vote and exercise of discretion as the Warden of the Dauphin County Prison in violation of either 18 P.S. §4303 or 18 Pa. C.S.A. §4701(a). Each occurrence contains the date upon which it allegedly took place, the individual from whom Davis supposedly accepted and solicited the money and the amount of the money which he was to receive. The language used to describe the conduct in which Davis allegedly engaged essentially tracks 18 Pa. C.S.A. §4701(a). Because Count II does inform Davis that he is accused of accepting bribes on particular dates, he does know what he has to meet at trial. It would be a better practice on the part of the United States Attorney to have set forth the acts which Davis was to perform in return for the money. But failure to do so does not violate the Constitution. Davis does not contend that

Count II of the indictment lacks clarity and is not plain or concise. Any possibility of prejudice or any burden which Davis may bear because he would allegedly have to anticipate the nature of the offense with which he is charged can be cured by a Bill of Particulars which Davis has filed and upon which this Court has ruled. The Court has granted those portions of Davis' request for a Bill of Particulars which in its view are necessary to apprise him of the charges against him with sufficient precision to enable him to prepare his defense and to avoid surprise. United States vs. Radetsky, 535 F.2d 556 (10th Cir. 1976), United States vs. Burton, 526 F.2d 884 (5th Cir. 1976), rehearing denied, 529 F.2d 523.

NOW, THEREFORE, IT IS ORDEDED THAT:

Davis' motion to dismiss the superseding indictment is denied.

Muir
Muir, U. S. District Judge